

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

FILED

OCT 29 2008


CLERK

SCOTT ANDREW KYLES,
Plaintiff,

vs.

NATALIE KAUFMAN, PROBATION
OFFICER

AND
KIM H. WILLIAMS, SUPERVISING
U.S. PROBATION OFFICER

CIVIL NO. 08-4169
TO BE SUPPLIED BY THE CLERK

Civil Rights Suit Under 5 USC
§§§ 552, 702, and 706

PRELIMINARY COMPLAINT FOR INJUNCTIVE RELIEF

COMES NOW Scott Andrew Kyles, Plaintiff in the above-entitled cause **pro se**, do hereby respectfully submit this preliminary complaint for injunctive relief as follows:

J U R I S D I C T I O N

1) This Honorable Court has jurisdiction over this matter by virtue of the authorities listed on the face of this complaint. In addition, plaintiff respectfully request the court recognize pro se effort and assert subject matter jurisdiction under any other law, rule, regulation, policy, procedure and/or precedence (whether or not cited in this action) that are now, or were at any time during this cause enforced and effected from which lawful jurisdictional authority could have been invoked.

2) This Court has jurisdiction over the Defendants in this civ-

il action. This action involves federal officials acting under the color of legal authority through the U.S. Probation Department.

3) Plaintiff acting pro se, is non-cognitive of the law and herein request this Court liberally construe this complaint pursuant to Haines v. Kerner, 404 U.S. 519.

P A R T I E S

4) Plaintiff is an incarcerated person confined at the Federal Correctional Institution, P.O. Box 1000, Sandstone, Minnesota 55072.

5) Defendants U.S. Probation Officer, Supervising U.S. Probation Officer and U.S. Chief Probation Officer have a legal mailing address of Phillips Centre, Suite 101, 300 S. Phillips Avenue, Sioux Falls, South Dakota 57104-6323.

REQUEST FOR JUDICIAL REVIEW PURSUANT TO 5 USCS §§ 702 AND 706

Ground One:

7) Title 5 USCS § 702, provides in pertinent part: A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is agai-

nst the United States or that the United States is an indispensable party."

8) **Title 5 USCS § 706**, provides in pertinent parts: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or reasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ...(C) in excess of statutory jurisdiction authority, or limitations, or short of statutory right." In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

9) Plaintiff's request for judicial review evolves from the Defendants failure to provide agency rules, made no determination of whether to comply with such request, failed to notify plaintiff of the reasons therefor nor advised plaintiff of the right to appeal to the head of the agency any adverse determination pursuant to Title 5 USCS § 552(a)(2)(C) and § 552(a)(6)(A)(i) , of the Freedom of Information Act.

10) **Section 552(a)(2)(C)** provides in pertinent part: "Each agency, in accordance with published rules, shall make available for public inspection and copying—administrative staff manuals

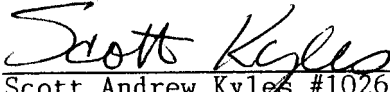
and instructions to staff that affect a member of the public."

11) **Section 552(a)(6)(A)(i)** provides in pertinent part: "Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination."

C O N C L U S I O N

12) According to the attached documentation it is easy for this Court to ascertain that the agency has failed to meet any of the timely requirements 5 USCS § 552, and as a result Plaintiff has not been able to exhaust his administrative remedies through the aforementioned United States Probation Department and therefore, request that this Court conduct a judicial review, and thereafter, compel agency action unlawfully withheld, and hold unlawful and set aside agency action found to be not in accordance with law.

WHEREFORE Plaintiff prays that this Honorable Court compels agency action where they have failed to abide by the procedures set forth in Title 5 USCS § 552 of the Freedom of Information Act.



Scott Andrew Kyles #10262-173

CERTIFICATE OF SERVICE

I Scott Kyles, do hereby certify that the original and one copy of the foregoing **Preliminary Complaint for Injunctive Relief** was delivered to this institution's mail room on Oct 27th, 2008, forwarded certified mail and properly addressed to: Clerk of Court, U.S. Courthouse, 400 S. Phillips Avenue, Sioux Falls, South Dakota 57104.

Scott Kyles
Scott Kyles #10262-173

RECEIVED
AUG 25 2008

U.S. PROBATION OFFICE
SIOUX FALLS, S. DAK.

FREEDOM OF INFORMATION/ PRIVACY ACT OF 1974

REQUEST FORM

TO: U.S. Probation Department
128 U.S. Courthouse
400 S. Phillips Avenue
Sioux Falls, South Dakota 57104-6851

FROM: Scott Andrew Kyles
Federal Correctional Institution
P.O. Box 1000
Sandstone, Minnesota 55072

Pursuant to Title 5 U.S.C.552 and all other relevant sections and parts there of, I the undersigned, also identified above in the upper right hand section of this form, hereby respectfully requests the following information:

I request documentation of this agency's policy, regulation, rule or law
that gave probation officer Natalie Kaufman the authority to add a 28 year
old criminal conviction to the presentence investigation report when such
fact could not be used by the district court to calculate my sentence nor
used by the Bureau of Prisons for rehabilitative purposes.

If there are applicable rules and regulations governing your Agency in such matters, please forward them to me so that I might comply with them per the Freedom of Information Act of 1974.

If for any reason any of the above requested information or material is deemed to be privileged and/or exempt under the F.O.I., please specify the statutory reasons for the exemption, the name and title of the person(s) making the decision to withhold the material.

Per the dictates of the Freedom of Information Act of 1974, your Agency has ten (20) working days to respond to this request. In the event I do not receive a response by that time, I will deem this to be a formal denial, and seek judicial remedy.

DATED: 8-20-08

Submitted by:

Scott Kyles
Requestor

Sworn and Subscribed before me this _____ day of _____, 2008

Deborah C. Jensen
CASE MANAGER/ NOTARY PUBLIC



Deborah C. Jensen

Notary Public-Minnesota

My Commission Expires Jan 31, 2011

August, 2008

Enclosed: Certification of Identity (DOJ Form 161)
Affidavit of Indigency

U.S. Department of Justice

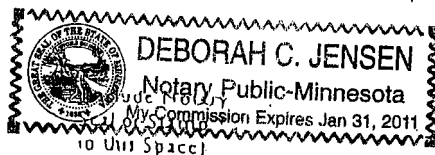
Certification of Identity

Agency Facility _____
Control Number _____

PRIVACY ACT STATEMENT: In accordance with 28 CFR Section 16.41, personal data sufficient to identify the individual submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disseminated by the Department. Failure to furnish this information will result in no action being taken on the request by the System Manager. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

FULL NAME OF REQUESTER: Scott Andrew KylesCURRENT ADDRESS: Federal Correctional Institution, P.O. Box 1000, Sandstone, Minnesota 55072DATE OF BIRTH: August 31, 1964PLACE OF BIRTH: St. Paul, Minnesota Ramsey CountyEMPLOYEE IDENTIFICATION NUMBER, if applicable: N/A
(or Social Security Number)

I certify that I am the person named above and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than \$5,000.

Subscribed and sworn to before me this 20 day of August, 2008.Signature: Scott KylesSignature of Notary: Deborah C. JensenMy Commission Expires: 01-31-2011

The bottom portion of this form to be completed by requester when he or she requests that information relating to himself or herself be released to another person:

Further, pursuant to 5 U.S.C. 552a(b) I authorize the U.S. Department of Justice or any of its component organizations to release any and all information relating to me to _____ (attorney or other designee).

Signature: _____

Name of individual who is the subject of the record sought: _____

Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

Signature of individual who is the subject of the record sought: _____

AFFIDAVIT OF INDIGENCY

In as much as the requested information is in the "Public Interest", and I have declared myself to be indigent, I ask that you "Waive all fees, cost, and/or charges" pursuant to 50.U.S.C. 552a (1) (3) et. seq.

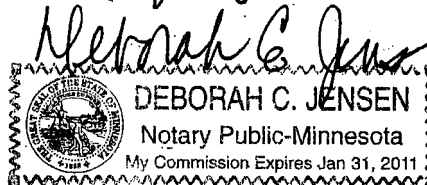
I, Scott Andrew Kyles am the requester in the attached F.O.I.A./Privacy Act Request and I declare under the penalty of perjury that I am an indigent inmate and have the amount of in my prison account, and have no other assets available.

Signature Scott Kyles

DATE 8-28-08

Sworn to before me this 20th day of August 2008

My commission expires on:



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
PROBATION & PRETRIAL SERVICES OFFICE

TERRYL R. CADWELL
CHIEF PROBATION/PRETRIAL OFFICER
Phillips Centre, Suite 101
300 S. Phillips Avenue
Sioux Falls, SD 57104-6323
(605) 977-8900
FAX: (605)977-8901

Reply To: Sioux Falls, (605)977-8931

P.O. Box 922
Aberdeen, SD 57402-0922
(605)377-2630
FAX: (605)377-2631

318 Fed. Bldg. & U.S. Post Office
225 South Pierre Street
Pierre, SD 57501-2463
(605)945-4640
FAX: (605)945-4641

257 Fed. Bldg. & Courthouse
515 Ninth Street
Rapid City, SD 57701
(605)399-5920
FAX: (605)399-5921

August 27, 2008

Scott Andrew Kyles, Inmate
Federal Correctional Institution
P.O. Box 1000
Sandstone, MN 55072

RE: Your request for documentation on agency policy, regulation, rule, or law regarding criminal history information reflected in presentence investigative reports

Mr. Kyles:

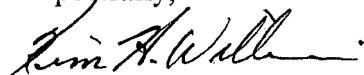
Pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, the court is authorized to order a presentence investigation and report when a defendant has been convicted, either through a guilty plea or a trial. The investigation and report is completed by the court's staff at the U.S. Probation Office. Pursuant to Rule 32(d)(2), "The presentence report *must* also contain the following information: (A) the defendant's history and characteristics, including: (i) *any prior criminal record.*"

Pursuant to USSG §1B1.4: **Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**, "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661."

Pursuant to 18 U.S.C. § 3661, Use of information for sentencing, "*No limitation* shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

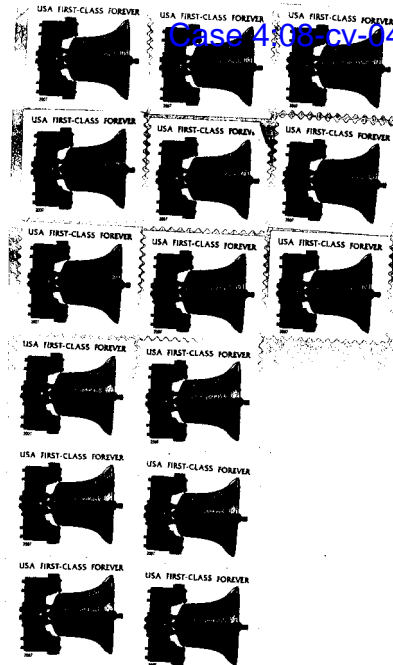
I believe your research into these citations will reveal the fact the presentence report completed in your case fully complied with *the requirements* of the applicable prescribed statutes and sentencing guidelines. Your officer had no choice but to include this information in the report.

Respectfully,

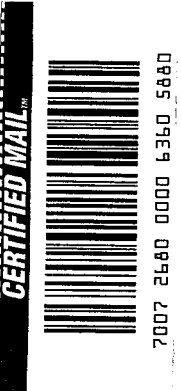


Kim H. Williams
Supervising U.S. Probation/Pretrial Services Officer

/khw



Clerk of Court
U.S. Court House
400 South Phillips Ave
Sioux Falls, South Dakota
57104



Scott Kyles
10262-173-K4 Unit
P.O. Box 1000
Sandstone Minnesota
55072
Federal Correction Institution

RECEIVED
FEDERAL CORRECTION INSTITUTION
NOV 11 2008
GEO